81-1634

No._____

Office - Supreme Court, U.S.
FILED
FEB 26 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

DuBROOK, INC., a corporation,

vs.

THE W. B. GIBSON COMPANY, a corporation,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LEE C. McCANDLESS
FRANK P. KRIZNER
301 Morgan Center
Butler, Pennsylvania 16001
Attorneys for Petitioner

McCANDLESS, KRIZNER & PRICE
of Counsel

Batavia Times Publishing Co.
Pittsburgh, Pa. (412) 881-7463

Question Presented

Did the Third Circuit Court of Appeals deprive the petitioner of its constitutionally protected property and contract rights, where it affirms without opinion a District Court decision, which ignored relevant and clear terms of the written agreements, made no independent determination of the substantive issues, and handed down a decision which is in conflict with decisions in the same matter in other Courts?

TABLE OF CONTENTS.

	Page
Question Presented	i
Opinions Below	2
Jurisdiction	2
Statement of Case	2
Basis of Jurisdiction in Court Below	2
Statement	2
Reasons for Granting Writ	13
Conclusion	17
Appendix A—Opinion of District Court	A1
Appendix B—United States Court of Appeals Affirmance of District Court's Opinion	A18
Appendix C—Denial of Petition for Rehearing	A20
Appendix D—Granting Motion to Stay Issuance of Mandate	A22
Appendix E—Purchase Order of Gibson Co. to DuBrook, Inc.	A24
Appendix F—Acceptance of Purchase Order by DuBrook	A26
Appendix G—Concrete Mix Design Prepared by West Penn Testing Laboratory	A27
Appendix H—Engineer's Notice of Contractor to Cease Pouring Except at Contractor's Risk	A28
Appendix I—Notice of DuBrook of Deficiency of Concrete	A29
Appendix J—Report of Erlin Hime Associates	A30

Page

INDEX TO CITATIONS.

John Ash Associates, Inc. v. Envirogenics Co., (1977) 425 F.Supp. 238 13
Henry C. Beck Co. v. Ross Island Sand & Gravel, (9th Cir., 1972) 456 F 2d 319 13
Brown v. Payne-Ladewig, Inc., (Texas Appeals Ct.) 568 S.W. 2d 159 14
Capitol Bus Co. v. Blue Bird Coach Lines, Inc., (3rd Cir., 1973) 478 F 2d 556 15
Lease *et al.* v. Corvallis Sand & Gravel Co., (9th Cir., 1972) 456 F 2d 316 14
United States v. El Paso Natural Gas Co., (1964) 376 U.S. 651, 84(a) S. Ct. 1041 16

Miscellaneous

Restatement of Contracts, Sections 235, 236 15
28 USC 1291 2
28 USC 1332 2

IN THE

Supreme Court of the United States

October Term, 1981

No. _____

DuBROOK, INC., a corporation,

vs.

THE W. B. GIBSON COMPANY, a corporation,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The W. B. Gibson Company, an Ohio Corporation, the petitioner herein, prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals, Third Circuit, entered in the above case on November 30, 1981.

Opinions Below

The Opinion of the United States District Court for the Western District of Pennsylvania is unreported and is printed in Appendix A. The affirmance by the United States Court of Appeals for the Third Circuit as set forth in its Judgment Order of November 30, 1981, is also printed in Appendix A.

Jurisdiction

The judgment of the United States Court of Appeals (Third Circuit) was entered November 30, 1981 (Appendix B, p. A18). A timely Petition for Rehearing was denied December 23, 1981 (Appendix C, p. A20). The jurisdiction of the Supreme Court is invoked under 28 USC 1254(1).

Statement of Case

Basis of Jurisdiction in Court Below.

This case was initially filed in the Common Pleas Court of Butler County, Commonwealth of Pennsylvania. It was removed to the Federal District Court for the Western District of Pennsylvania on the basis of diversity of citizenship, the amount in question being more than $10,000 and the parties being citizens of different States. (28 USC 1332).

An appeal was taken to the Third Circuit Court of Appeals from the final judgments entered by the District Court in accordance with 28 USC 1291.

Statement.

The petitioner, a general contractor, was the successful bidder for a contract to construct a sewerage disposal plant in the Borough of Zelienople, Pennsylvania, for

$3,845,000.00 to be paid for by a Federal Grant and the local municipality.

The general construction contract between the owner and the petitioner provided that the concrete to be used in the construction of the plant was to attain, within 28 days after it was in place, a compression strength of 4,000 pounds of pressure per square inch.

All relevant provisions of the general contract were required to be integrated into all subcontracts, accordingly all subcontracts were to be let in accordance with the terms of the general contract and specifications.

The general contractor, The W. B. Gibson Company, after investigating the concrete suppliers in the area, entered into a contract with DuBrook, Inc., a corporation. This subcontract was approved by the construction engineers for the owner. Based upon the cost quotation by the suppliers Gibson calculated its bid for the entire project.

One of the major provisions of the complete integrated contract and in particular the subcontract with DuBrook, required that the concrete after being placed would attain a compression strength of 4,000 pounds of pressure per square inch in 28 days.

At the time of delivery of the concrete, cylinderical samples about 12 inches long and 6 inches in diameter were taken and delivered to West Penn Testing Laboratory for testing 28 days later. By the time the first test results were received by the petitioner, 840 cubic yards of concrete had already been poured in the foundation of the structure. The test results indicated that the concrete in place did not meet the contract specifications and the contractor was notified not to con-

tinue to pour additional concrete until the problem was corrected. It was generally agreed the faulty concrete already in place could be retained, however, it was to be covered and kept heated until it reached the specified strength, which procedure caused a five months' delay. When construction resumed, it was found the new concrete delivered also failed to meet 4,000 pounds of pressure per square inch in 28 days. The petitioner changed the supplier of concrete and had no more trouble on the project with faulty concrete.

DuBrook sued on the contract to recover for concrete not paid for in the sum of $20,156.00 and for its loss of profits for concrete delivered by the second supplier in the sum of $7,277.00. Judge Simmons, substituting for Judge Snyder, who died after the close of the testimony but before rendering a decision, entered judgment against the petitioner for $27,433.00 plus interest. The petitioner had counterclaimed for delay damages caused by the extra ordinary procedure needed to cure the concrete failing to meet 4,000 pounds of pressure per square inch in 28 days, extra costs and loss of profit. The decision judge found against Gibson on the counterclaim, fortifying his decision by stating that Gibson's testimony was unbelievable. This was affirmed by the Third Circuit Court.

The case did not present a question of credibility, since relevant evidence was documentary or undisputed. Both the original suit and the counterclaim were based on the interpretation of the contract. Both parties recognized it but the Court did not apply its terms to both parties. Selective application of the contract provisions is not the rule of law. The contract must be considered as a whole not as the District Court construed it.

Although cylinderical samples are taken upon delivery of concrete in its plastic state, there is no way of telling that it meets the required standard until 28 days after delivery when the samples were tested. This is the very reason for binding the parties to this requirement in the contract. The District Court held, however, that this provision did not apply to DuBrook for the reason the supplier was selected by the general contractor with the approval of the owner. The Court concluded that notwithstanding the terms of the contract it was the general contractor who assumed the risk of faulty concrete even though the owner's engineers approved the formula for the mix, and it was DuBrook who by their subsequent subcontract assumed such obligation and, in fact, mixed the concrete.

Undisputed and unrebutted expert testimony established that the poor concrete was caused by the use of an additive that was absolutely and exclusively in the control of the subcontractor, DuBrook. The Court ignoring this fact and the clear provisions in the contract based its decision on irrelevant matters, depriving the petitioner of its property and contract rights.

In every Federally funded construction project the rights and obligations of the parties will be identified in a contractual arrangement involving integrated documents similar to those in the case at bar. Without reference to the application for Federal Grants made by the owner, the prime construction contract can be easily identified as the general contract and specifications prepared by the owner or his agent or engineer and used as the basis for bidding. All of these contracts contain a provision requiring that the specifications set forth in the prime contract, in conformity with the Federal guidelines, be incorporated into subcontracts which might be

let by the general contractor. The entire contractual arrangement clearly evidences a well developed plan whereby the funding agency can look to the owner, to the general contractor, and to each of the subcontractors, or their subcontractors, in the event of a breach or in the event of a design or construction problem. In the case at bar, the District Court in its Decision, which was affirmed by the Third Circuit Court of Appeals concludes that the provisions of the prime contract are not applicable to subcontractors. In addition, any liability of the subcontractor which might be based upon the integration of the documents, can be easily and unilaterally waived.

The prime contract between the owner and Gibson, the general contractor, was incorporated by reference into the subcontractor between Gibson and DuBrook. This was not disputed by any party and, in fact, was acknowledged by the principals of DuBrook in their testimony. One of the requirements of the prime contract and the subcontract was that the concrete used in the construction of the sewage treatment plant must obtain a compression strength of 4,000 pounds of pressure per square inch at the end of 28 days. It is a fact that the strength of concrete increases for a period of time at a rapid rate and theoretically after a certain period would increase at a slower rate. The measure of the strength of concrete therefore is directly related to the speed at which it is cured and at which it will reach its maximum strength. To determine if the concrete in place is hardening at the required rate, it must be tested at different intervals of time. Hence, the test at 28 days.

It is a fact that is worthy of judicial notice that the strength of concrete in a sewage treatment facility is one of the most critical considerations. This is recognized by

all parties and is made a part of the contractual obligations. This most critical aspect, therefore, is to be a burden and liability placed upon all parties who are involved with the construction of the treatment plant requiring the use of concrete.

The District Court absolved the supplier of any liability under the express written contract. The Court concluded that an attempt by the owner and the general contractor to prescribe a formula which was developed to help insure the use of concrete of the proper strength, was a fact that removed the subcontractor who supplied the concrete from any liability under the written documents.

It is impossible to envision how an owner or a general contractor may more clearly bind a subcontractor to the requirement of providing concrete of a given strength in 28 days. If this Court permits the interpretation of the contractual documents by the District Court and the Third Circuit Court to stand, the effect of this determination upon the construction industry would be to place suppliers of semi-manufactured products, such as concrete, in a position beyond the scope of any contractual liability.

The integrated documents are contracts with provisions that speak for themselves. The subcontractor agreeing to those terms accepts the liability for his failure to deliver concrete of a specified strength. Unless the terms are waived in accord with the provisions of a contract between the supplier and the general contractor liability must be predicated upon the written provisions.

The Court in construing the provisions of an integrated contract must first consider which documents were intended as part of the total agreement. It must then

construe all of these provisions together as a whole to determine what the intent of the parties might be. It is error to overlook this intent and to adopt one provision as the entire substance of the agreement. This in fact was the direction taken by the District Court in the case at bar.

The petitioner gave a written order for the supplying of concrete to DuBrook on April 7, 1977. Both parties pled and relied on this order as part of the contract between the parties. The order incorporated specifications contained in the prime building contract.

The relevant specifications are as follows:

"3. *MIX DESIGN*

B. Water—Cement Ration and Compressive Strengths

All Class A concrete shall have a maximum water content of 5.6 gallons per sack of cement including the free moisture in the aggregates and a minimum compressive strength of 4,000 pounds per square inch at 28 days.

D. *Air Engrainment*

The amount of air entrained in the concrete shall be five (5) ÷ one (1) percent, by volume as determined by direct measurement or by ASTM C-138."

Both parties had access to the above specifications prepared by the engineer for the project.

The District Court, which was not the Trial Court, construed this contract against the petitioner in that it required the purchase of all concrete for the project from the supplier, DuBrook, and on failure so to do rendered a judgment against Gibson. Further the Court denied the

petitioner the right to recover for construction delay caused by the failure of the concrete to meet the compression strength in 28 days of 4,000 pounds of pressure per square inch, on the grounds that this provision was not enforceable because of the control Gibson had over inspection of the concrete. The Circuit Court in a panel decision affirmed without an opinion.

It is submitted the decision evidences a lack of understanding that the compression strength could not be determined by actual test until 28 days after the concrete was in place. For this reason the duty to meet this requirement was placed by the specifications and order on the supplier, DuBrook. It is undenied that the concrete supplied by DuBrook did not meet this standard.

The testing process, that is, which tests could produce results when the concrete was poured and in its plastic state, was not understood by the Court.

When unloading a truck of concrete, the contractor, under direction of the owner's engineer, takes preliminary air tests and slump tests and if the concrete is not workable, or is low on total air, requires additional water or air. He then takes a sample which is cylinderical, about 12 inches long and 6 inches in diameter which is delivered to the testing laboratory for further testing to determine whether or not the concrete poured is of such quality that in 28 days after pouring it will meet the compression test specified by the contract. Because this is the only reliable testing method it was essential that the supplier agree by contract to deliver concrete that will reach this compression test.

Pouring started June 21, 1977, on this project and after 840 cubic yards had been poured at the base and most critical point in the project, the construction

engineer for the Authority orally notified the contractor to stop pouring concrete on what had already been placed. When the cylinder samples, after waiting 28 days, were tested it showed that 29% of the 840 cubic yards of concrete had not met the required standard of 4,000 pounds of pressure per square inch in 28 days. All of these first pours were placed in the critical foundation portion of the project.

On September 27, 1977, the construction engineer notified the contractor in writing that no further work was to be accomplished in the area where the faulty concrete was used except at the contractor's risk. This meant that the contractor might be required to dig out all the concrete placed and pour new concrete.

This was averted by an extended curing process which consisted of covering, heating and keeping the concrete wet.

The construction schedule called for all concrete to be poured by December 17, 1977, so that the sheltered inside work could be done during the winter months. No further pouring of concrete was done until after the curing process was completed in the spring of 1978.

No one contested the delay had been caused by the concrete not attaining 4,000 pounds of pressure per square inch in 28 days. However, the Court has absolved the supplier from any obligation to perform this part of the contract, relying on the fact that the contractor was required to make tests as to air, slump, and provide testing cylinders for the testing laboratory to make the test 28 days after the concrete was in place.

The contractor, petitioner herein, had no control over the mixing of the concrete. The mix design had been tested by the West Penn Testing Laboratory, Inc., which showed if properly mixed in the proper sequence it would result in 5250 pounds of pressure per square inch in 28 days. Consequently, the mix design gave to the supplier plenty of leeway when it only required the concrete to reach 4,000 pounds of pressure per square inch in 28 days.

It is submitted the Court has overlooked the responsibility of the supplier under the contract. Since there was no way of telling prior to the concrete being in place for 28 days whether it reached the compression strength or not, the obligation to produce concrete which will meet this specification is on the supplier who professed to be an expert in the field.

In so contracting, the ordinary provisions used in the construction industry were inserted in the contract, requiring the supplier to produce concrete according to the designated mix that would reach the required compression strength. If this cannot be required in a construction contract and is not binding on the supplier, then the substance of the contract has been destroyed for the compression strength cannot be determined for 28 days after the concrete is poured.

The mixing of concrete and adding the air entrainment agent was completely under the control of the supplier, DuBrook. The President of DuBrook testified that by its contract it was bound by all the terms of the general specifications incorporated into the order.

DuBrook's expert testified that DuBrook was bound to produce concrete that attained 4,000 pounds of pressure per square inch in 28 days. Thus DuBrook by its own testimony recognized its duty under the contract.

The engineer for the owner required core drilling tests to be taken of the poured concrete under the direction of West Penn Testing Laboratory who found the initial test results from the 28 day cylinder tests were corroborated by the core tests. These core drillings were sent to Erlin Hines Associates in Chicago, and a spetrographic study of the cylinders was made. It was determined the test from the areation tank base and the chlorine tank base showed a range of compressability strength from 2650 to 3690 pounds of pressure per square inch, all under the requirements of the contract. Erlin Hines, the expert whose testimony was not contradicted, testified the lack of compression strength was caused by an excess of air entrainment agent, and not excessive water. This ingredient was exclusively under the control of DuBrook at the time of mixing.

After this testimony the Hearing Judge and all parties agreed that water and slump were out of the case and the sole cause of the faulty concrete was the entrained air.

Reasons for Granting Writ

The decision of the District Court, as affirmed by the Third Circuit, was precisely the position taken by the District Court in *Henry C. Beck Company vs. Ross Island Sand & Gravel*, 456 F 2d 319 (9th Cir., 1972), which was reversed on appeal stating:

> "By specifying the addition of Pozzolith 3L to the concrete, plaintiff assumed the risk that concrete containing such admixture might fail to set and harden the normal rates and might contain excessive entrained air with consequent loss of compression strength."

On appeal the Circuit Court for the Ninth Circuit clearly and unequivocally stated that this conclusion was erroneous. The Appellate Court for the Ninth Circuit determined that if a risk of liability was assumed by the general contractor and the owner under provisions of a contract similar to the ones in the case at bar, it was a risk of the use of concrete with a proper amount of admixture. The holding by the District Court in the case at bar, as affirmed by the Third Circuit, was directly opposed to the holding of the Circuit Court for the Ninth Circuit.

The Beck Court, however, did not consider the application of integrated documents because the matter was not raised on appeal. The Court did, however, apply the 28 day strength requirement to the supplier. In addition, in the case of *John Ash Associates, Inc. vs. Envirogenics Co.*, 425 F. Supp. 238 (1977), the Court considered whether or not the general conditions of a prime construction contract were incorporated by reference into a subcontractor's agreement where there were no clear and unequivocal references in any of the documents to an in-

corporation of the general conditions in the purchase order. In that case, the Court concluded that the general conditions in the prime contract were a part of the subcontract agreement. The Court stated:

> "While we do not lightly dismiss the lack of actual notice to plaintiffs of the incorporation, they are nonetheless held to have been given sufficient constructive notice to support the incorporation by reference of the 'general conditions' in their entirety into the contract."

The Court concluded that surrounding circumstances could be reviewed to determine that such incorporation was intended. In the case at bar, DuBrook was referred specifically to the prime contract in the purchase order and was advised that work was to comply with the specifications and drawings contained in that contract. Clearly, DuBrook had more than constructive notice that the general conditions of the prime contract were meant to be incorporated by reference in the purchase order agreement between DuBrook and Gibson.

The case of *Lease et al. vs. Corvallis Sand & Gravel Co.*, (9th Cir., 1972), 456 F 2d 316, is a case involving a subcontractor furnishing concrete required to have a compression strength of 3,000 pounds of pressure per square inch in 28 days. It was held the standard specifications between the owner and contractor applied to the subcontractor and he was bound by his purchase order to produce the concrete that would achieve this compression test. This case also recognized that adding water at the job site was a customary practice.

In the case of *Brown v. Payne-Ladewig, Inc.*, (Texas Appeals Court), 568 S. W. 2d 159, the general contractor received a bid on a subcontract for the installation of

heating and air conditioning units in a housing project on an Army base. Upon the inability of the subcontractor to perform the general contractor secured the items from another supplier at a greater cost. The Court held the defaulting subcontractor was liable for the general contractor submitting a bid. A contractor must be able to rely on a price quoted by a proposed subcontractor in order to make a firm bid, otherwise no contractor could bid with certainty and this would affect the entire building industry.

The four cases hereinbefore mentioned, two from the Ninth Circuit, one from the District Court, and one from the Texas Court of Appeals, all set down principles of law which are opposite to the findings of the Court below and affirmed by the Third Circuit Court. It is the petitioner's contention, therefore, that this Petition for a Writ of Certiorari should be granted and a review of the law of this case should be made.

It is submitted in affirming the judgment of the Court below the Appellate Court (Third Circuit) approved an erroneous interpretation of the contract making its terms apply to the general contractor as to the quantity of concrete to be purchased but not to the supplier as to the quality of the concrete to be supplied.

The decision court did not see or hear the witnesses and the sole question is one of interpreting the written contract which both parties admit and rely upon for recovery.

The Appellate Court ignored the cannons of interpretation it laid down when it approved Secs. 235 and 236 of the *Restatement of Law of Contracts* in the case of *Capitol Bus Company vs. Blue Bird Coach Lines, Inc.*, (1973, 3rd C.A.), 478 F 2d 556, when on Page 560 it stated:

> "A contract is to be considered as a whole, and, if possible, all its provisions should be given effect; while a contract's provisions must be interpreted with reference to the whole the specific controls the general; and a contract should be construed so as to give effect to its general purpose."

It is obvious that the general purpose of the specifications and the purchase order, incorporating them into the contract, was to assure Gibson that he could rely on the concrete delivered as meeting the terms of the contract and specifications. After 28 days the concrete was to reach 4,000 pounds of pressure per square inch. This it did not do. DuBrook, not Gibson, the contractor, violated the general purpose of the contract and the specific provisions therein.

After the death of the trial judge the decision court adopted *in toto* the Findings submitted by opposing counsel and then fortified his Opinion by stating the position of the petitioner was unbelievable. This was done even though the written contract was admitted and relied upon by both parties. The Court interpreted its terms to apply to one party but not to the other.

In the case of *United States vs. El Paso Natural Gas Co.*, (1964), 376 U.S. 651, 84(a) S. Ct. 1041, in an Opinion by Mr. Justice Douglas on Page 1047 it is stated:

> "Those finding, though not the product of the workings of the District Judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence.* * * Those drawn with the insight of a disinterested mind are, however, more helpful to the Appellate Court."

Conclusion

The written integrated contract involved in this case is in general usage in the construction industry. If the decision of the Third Circuit Court of Appeals is permitted to stand applying the terms of the contract to the general contractor as to quantity but not to the supplier as to the quality, a general contractor could not bid with certainty and construction costs would necessarily be greatly increased.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LEE C. McCANDLESS
FRANK P. KRIZNER
McCANDLESS, KRIZNER & PRICE
Attorneys for Petitioner

APPENDIX A

Opinion of District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DuBROOK, INC., a Corporation,

Plaintiff,

vs.

THE W. B. GIBSON COMPANY, a Corporation,

Defendant.

CIVIL ACTION NO. 79-1365

PRELIMINARY STATEMENT

W. B. Gibson Company entered into a contract with Western Butler County Authority for construction of a Water Pollution Control Plant at Zelienople, Butler County, Pennsylvania. DuBrook, Incorporated, received a Purchase Order from W. B. Gibson Company for ready mix concrete on the job. The Purchase Order, styled Plaintiff's Exhibit 4, was dated April 7, 1977, but was made contingent upon the W. B. Gibson Company's receiving the contract award. Such award was made May 5, 1977, and DuBrook was notified of the event by Change Order of W. B. Gibson Company, dated May 27, 1977.

The plant facilities of DuBrook were inspected and approved by a representative of Gibson. A mix design prepared by West Penn Testing Laboratories was obtained by Gibson and furnished to DuBrook in connection with the terms under the Purchase Order. DuBrook followed the mix design in every instance, except when directed by the resident engineer or Gibson to add more AEA, (air entraining agent) to add more water, to add plastiment, or to increase the cement content. DuBrook made no variations on its own initiative.

DuBrook entered into the performance of the Order and commenced supplying concrete to the job site on June 21, 1977. On that date, one pour was removed at the direction of the resident engineer because the slump was too high. Every subsequent load of concrete delivered to the job site and poured was accepted and is still in place.

Deliveries by DuBrook continued, with payment by Gibson being made on a monthly basis. When payment was not made for deliveries of May 1978, DuBrook made no further deliveries. At that time the amount due DuBrook was $30,156.73. Thereafter, Gibson made a payment of $10,000.00 on account on August 23, 1978. No further payments were made.

In addition, DuBrook claimed damages for loss sustained as a result of another contractor's supplying the concrete which DuBrook would have supplied had it been paid monthly as agreed. The amount of concrete delivered by the other contractor was 1,146 yards, from which DuBrook would have realized $6.35 per yard after deduction of fuel costs and drivers' wages from the

agreed price per yard. The damage figure for this element is $7,277.10. The total amount claimed in this suit is $27,433.83.

Gibson filed its Counterclaim, alleging deficiencies in the product delivered by DuBrook and claiming damages for expenses and down-time in connection with and resulting from the curing of such alleged deficiencies. A non-jury trial before the Hon. Daniel J. Snyder, Judge, commenced April 14, 1980, and terminated on April 21, 1980. Judge Snyder died before his decision was recorded, and the case was assigned to the Hon. Paul A. Simmons. After conference with the attorneys of record and Judge Simmons, it was agreed that the parties could submit their Requests for Findings of Fact, Conclusions of Law and Briefs, and that the matter would be argued at length before Judge Simmons.

After considering arguments of counsel, the trial record, the pleading and the filed briefs, the Court makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Section IV of the Specifications for the Western Butler County Authority for construction of a Water Pollution Control Plant at Zelienople, Butler County, Pennsylvania, to which reference is made in the W. B. Gibson Company Purchase Order to DuBrook, Incorporated, deals with excavation, and is not applicable to the deliveries by DuBrook under said Purchase Order.

2. Section III of the Specifications for the Western Butler County Authority for construction of a Water

Pollution Control Plant at Zelienople, Butler County, Pennsylvania, to which reference is made is the W. B. Gibson Company Purchase Order to DuBrook, Incorporated, deals with "materials" and of said Section only subsections 1 through 4, 9 and 10 are applicable to the deliveries by DuBrook under said Purchase Order.

a) Subsection 1, "Portland Cement" was complied with by DuBrook as to Type II as evidenced, inter alia, by:

1) Defendant's Exhibit 4—Mix Design of West Penn Testing Laboratories, Inc. (WPTL) dated June 2, 1977, and approved by Defendant.

2) Defendant's Exhibit 20—Report of Erlin, Himes Associates, dated March 8, 1978.

3) Defendant's Exhibit 18—Letter of Duncan, Langnese and Associates, Inc., dated March 17, 1978, at Page 2, wherein it was stated that, "The design mix specified in the contract documents was utilized."

4) No complaint was made by or for the Defendant that the Portland Cement was below specifications.

And, Type III was never called for.

b) Subsections 2, "Fine Aggregate" and 3, "Coarse Aggregate" were complied with by DuBrook, as evidenced, inter alia, by:

1) Defendant's Exhibit 4, 20 and 18 as above.

2) Defendant's Exhibit 19, report of WPTL, dated May 19, 1978, that fine aggregate *did* comply with specification requirements.

3) The WPTL report of May 26, 1978, confirms that coarse and fine aggregates met specifications.

4) No complaint was made by or for Defendant that the aggregates were below specifications.

c) Subsection 4, "Water for Concrete", was complied with as evidenced, inter alia, by Defendant's Exhibits 4, 20 and 18 above, and further by the fact that no complaint was made by or for Defendant that the water was below specifications.

d) Subsection 9, "Calcium Chloride", was complied with in that it was used once, on October 25, 1977, at the request of Defendant's Project Superintendent, and no complaint was made by or for Defendant as to the same.

e) Subsection 10, "Grout", was complied with in that the specified ingredients were used in the required proportions.

3. All materials were stored and handled at DuBrook's Evans City Plant in such a manner as to insure retention of their initial conformity to specifications, as evidenced, inter alia, by:

a) Defendant's Exhibit 25—"Report of WPTL Batch Plant and Pre-concreting Inspection", dated January 11, 1978, stating that the plant could produce quality concrete.

b) Defendant's Exhibit 23—WPTL "Concrete Batch Plant Inspection", stating that the plant scales were inspected and certified and that the plant met the criteria in NRMCA (National Ready Mix Concrete Association) guidelines.

4. The batching procedures used by DuBrook were those recommended by the NRMCA, and were effective in utilizing the components as specified and the batching plant facilities to produce a concrete to meet specifications, and these procedures included the following:

a) Aggregate was taken from a paved, ground storage bin by front end loader, placed in a confining hopper for transfer by conveyor belt to overhead storage bins, dropped into a weigh batching hopper, weighed in proper amounts and then conveyed by belt into the back of a truck.

b) Cement in dry bulk was moved by enclosed screw conveyor to weighing hopper with automatic shutoff when prescribed amount was reached, and then was dropped directly into the truck.

c) Water was volumetically batched with an automatic shutoff device, with about 75-80% of the specified water being added at the plant.

d) Admixtures were measured in visual volumetic devices. The air entraining agent (AEA) was added directly to the water supply. The Plastiment was added directly to the fine aggregate after weighing.

5. The Mix Design was formulated by WPTL and approved by Defendant without DuBrook's being consulted, and DuBrook followed the Mix Design explicitly, except when the same was modified by instructions of employees of the Project Engineer or by employees of the Defendant, in which event the modifications were followed explicitly, as follows:

a) From time to time the amount of air entraining agent (AEA) was changed.

b) Defendant's Chief Engineer requested an increase of the cement from 6.5 sacks to 7 sacks.

c) From time to time, DuBrook's drivers were instructed to add bags of cement of the Defendant to loads of concrete after delivery to the job site.

d) From time to time DuBrook's drivers were instructed to add air entraining agent (AEA) to loads of concrete.

e) The drivers added sufficient water on the job site to bring the slump to 2-1/2" to 3", and thereafter any water added by the drivers was at the express direction of project engineer or the Defendant's employees.

f) Plastiment was added at the batching plant at the direction of Defendant.

g) To the extent that there was any conflict between the terms of the mix design formulated by the West Penn Testing Laboratories, Inc., and the written specifications, this Court finds as a fact that the parties intended that the terms of the mix design were to control the mixing of the concrete.

6. The last payment by Gibson on account of the balance claimed to be due was in the amount of $10,000.00, and was made on August 23, 1978, just short of 3 months after DuBrook had ceased making deliveries to the job.

7. The unpaid balance due from Gibson to DuBrook for deliveries made is $20,156.73, and interest at 6% per annum is due thereon from May 31, 1978.

8. DuBrook ceased making deliveries by reason of the improper withholding by Gibson of the balance due as of May 31, 1978.

9. Deliveries which DuBrook would have made after May 31, 1978, had not Gibson breached its contract, amounted to 1146 cubic yards, from which DuBrook would have realized $7,277.10, for profit and overhead.

10. DuBrook is entitled to damages as a result of the breach of contract and the loss of profit and overhead, in the amount of $7,277.10, with interest from December 6, 1978.

11. DuBrook had no control over the mix design which was intended to achieve 4000 psi concrete, and, if the mix design would have been effective to produce 4000 psi concrete, variations in the mix design ordered or accomplished by employees of the Project Engineer or employees of the defendant, resulted in concrete test cylinders of strength less than 4000 psi, which variations are described as follows:

a) DuBrook drivers were instructed to add water into the load on the job site after the slump had been brought to 2-1/2" to 3" by the drivers.

b) Additional water was added to the concrete as it came down the chute from the truck, not by DuBrook drivers.

c) Additional water was added to the concrete as it moved on Defendant's conveyor, not by DuBrook drivers.

d) Additional water was added to the concrete in the concrete pump hopper, not by DuBrook drivers.

e) On at least one occasion, Joe Holland, an employee of Defendant, released water from the truck tank directly into the load before it was discharged.

f) Air entraining agent (AEA) was added to loads at the job site on instructions of Defendant's employees or the Project Engineer.

g) Air entraining agent (AEA) was increased from time to time upon orders of other than DuBrook personnel.

h) Plastiment was added at the direction of Defendant's General Superintendent without giving proper consideration to the need for more careful air testing when using AEA and plastiment concurrently.

12. As a result of the various items set forth in 11 above, either separately or in combination, tests of the concrete poured indicated a strength of less than 4000 psi, which can be explained as follows:

a) Excessive water added after the 2-1/2" slump had been attained by DuBrook's drivers increased the slump, changing the water-cement ratio and causing a higher air percentage in the concrete.

b) As a rule of thumb, a minimum decrease of 5 or 6 per cent in strength can be anticipated for each percentage point of air greater than that of the actual trial mixes.

c) Plastiment acts as a retarder to cement hydration and prolongs strength development, particularly when Type II cements are used, so that 28-day strength tests would not accurately represent the ultimate strength of the concrete.

13. Test procedures employed by Defendant or by others engaged by Defendant to make tests did not follow ASTM procedures, as required by the job specifications, in that:

a) A Chase air indicator employed on the job site does not meet ASTM testing standards of accuracy.

b) Slump tests were not taken every time a test cylinder was being cast.

c) Test cylinders were not properly filled and todded.

d) Proper air tests were not taken each time a test cylinder was being cast.

e) Temperature of the concrete in the test cylinder was not recorded.

f) Test cylinders were not protected on the job site, in that they were not moved immediately to the proper curing box to remain for the first day.

g) Test cylinders were not delivered to the testing laboratory within 20 hours, plus or minus 4 hours, after they were cast.

h) Weights of test cylinders were not recorded in test reports.

i) The required number of test cylinders were not tested on all occasions.

j) Time of concrete in trucks exceeded specification limits of 45 minutes.

14. As a result of the items in 13 above, the cylinder tests upon which Defendant relies are inaccurate and fail to prove that the concrete delivered by DuBrook did not meet contract specifications.

15. DuBrook volunteered suggestions, demonstrations and recommendations to the Project Engineer and General Superintendent of Defendant for the elimination of the reported low strength of the test cylinders, as follows:

a) A re-design of the mix was suggested the first day of the job, to add a water reducing agent to facilitate placement of the concrete without adding extra water.

b) Acquisition of an approved pressure meter to measure the air content of the concrete.

c) Acquisition of a water curing tank to properly cure the test cylinders.

d) Acquisition of a scoop to place concrete in the test cylinders instead of using a shovel.

e) DuBrook test cylinders made for demonstration purposes showed decreasing strength as slump was increased.

f) Institution of a quality control program under which "Testing" in accordance with Section II of the Specifications, which were the responsibility of the contractor, would be conducted under ACI Standard 214-65.

16. Notwithstanding the recommendation in 15(a) above, DuBrook's successor supplier on the job had a concrete mix design providing for a reducing agent, Possolith - 200 N. See WPTL Report of June 7, 1978 to Defendant.

17. The mix design as supplied to DuBrook was itself out of specification in that the air of 6.3 exceeded the five plus or minus 1% allowable, and the 3-1/2" slump exceeded the 1" to 3" slump specified for vibrated concrete.

18. At all times during the purported delay in construction to which Defendant attributes most of its damage, DuBrook was ready, willing and able to provide concrete upon sufficient notice; no notice was given and no orders were placed with DuBrook by Defendant.

19. After DuBrook had ceased supplying concrete to the Water Pollution Control Plant site, at which time the balance due DuBrook was $30,156.73, Gibson, with full knowledge of any deficiencies in the concrete for which DuBrook claimed to be paid, asserted no offset or counterclaim for damages, but rather, on August 23, 1978, paid $10,000 to DuBrook on account.

20. Although Defendant, on January 24, 1979, threatened a counter suit if DuBrook filed a suit against it for the balance of $20,156.73, due and owing as of May 31, 1978, the Defendant never asserted a claim against DuBrook by reason of any non-performance of the contract by DuBrook, until after the within action was instituted.

21. Control over the concrete of DuBrook supplied to the project was in the Project Engineer and the Defendant—they set the mix design, they approved the

components, they approved the weighing and measuring procedures of DuBrook, they approved the batching facilities of DuBrook, they alone directed variations in the mix design, they supervised the final mixing at the job site, they had the right to accept or reject any given load (which right to reject was exercised by them), they controlled the unloading, they controlled the method of placing the concrete, they controlled sampling and testing at the job site, and they accepted all of the concrete now in place.

22. After the first pour on the first day on the job, June 21, 1977, no concrete poured on the job from DuBrook truck was ever removed after pouring. The concrete was accepted by the owner, and the Defendant was paid by the owner for the concrete.

23. Concrete delivered to the job site by DuBrook and used in the project met all specifications to the extent that DuBrook was allowed by the Defendant to exercise control over the concrete to the time that it was poured. DuBrook mixed exactly what it was told to mix, and in the manner in which it was told to mix it.

24. It is not the ultimate strength of the concrete which is the criterion in this case; rather it is the extent to which Defendant is responsible for the end results, by reason for the influence and control which it exercised over the concrete.

25. The responsibility for any deficiencies is the concrete on this project lies with the Defendant, because it continuously retained enough control to be responsible for the end product.

26. W. B. Gibson Company shut down the Western Butler County Authority project for a period of 65 days over the Winter of 1977-78, because of the severity of the weather, consisting of long periods of cold weather and large accumulations of snow, and no work critical to the overall purposes of the job was accomplished.

27. Sec. II-2, of the Specifications required the contractor to perform and pay for all Tests of the Job Concrete.

28. In connection with delays in progress of the work at the job site, the first time that Gibson attributed such delays to concrete problems was August 20, 1979, five days after the Complaint in Assumpsit in this matter was filed by DuBrook.

29. DuBrook's damages for concrete sold to W. B. Gibson is $20,156.73.

30. DuBrook's damages for the loss of its right to sell the balance of the concrete to W. B. Gibson per the contract is $7,277.10.

31. The testimony of the witnesses of the Defendant against the claim of the Plaintiff and in support of the counterclaim of Defendant is unbelievable and not credible. (For the following reasons:)

(a) Defendant never advised the Plaintiff of any inadequacies of the concrete in question of any kind or nature whatsoever until five days after Plaintiff filed this law suit and over fifteen months after the job was completed.

(b) All concrete sold by the Plaintiff was retained by the Defendant and is still in place.

(c) There was no unnecessary or costly delay in the construction occasioned by alleged bad concrete delivered by the Plaintiff to Defendant's job site.

Judge Snyder said it well when Bruce E. Rhodes, chief engineer for the W. B. Gibson Company had apparently concluded his testimony on damages,

> "THE COURT: How do you say that he has shown anything with respect to the period of delay? Any basis at all for the conclusion that there was five months delay? He starts out by saying, "We could have claimed more. We thought in fairness we would only claim five." It's only a guess; a guesstimate of the worse kind. There's no proof of one single minute of delay, not one single minute, except his willingness to state an opinion. On what basis?" (R. 339).

(d) Further, the President of Gibson never asserted a counterclaim and never responded to requests of DuBrook for an itemization of any amount claimed by way of adjustment until after DuBrook had filed its Complaint.

(e) Over two months after Plaintiff had ceased delivering the concrete that the Defendant now alleges to have been defective, the Defendant paid the Plaintiff $10,000.00 on account.

(f) The Defendant Contractor in fact tested or should have tested each batch of concrete as it was delivered. It is unbelievable that the Defendant would knowingly accept unacceptable or defectively mixed concrete, and partially pay for the same some several months after delivery. The only rational conclusion is that the Defendant's testimony and claim in this case is totally unbelievable.

CONCLUSIONS OF LAW

1. Plaintiff DuBrook supplied a product in accordance with all relevant agreements of the parties and the mix design furnished by Gibson, as modified by Gibson and the project engineer. The price per unit was stipulated, the quantity supplied is not in dispute, the amount paid on account for the quantity delivered is agreed upon, and consequently, DuBrook is entitled to $20,156.73, as the balance due by reason of concrete purchased by Gibson.

2. Defendant Gibson materially breached its agreements with Plaintiff and more particularly its Purchase Order Contract when it neglected to pay for concrete delivered in the month of May, 1978; DuBrook was justified in not making further deliveries under the terms of the Purchase Order by reason of the failure of the Defendant to pay for past deliveries promptly; a subsequent supplier delivered 1,146 cubic yards of concrete which Plaintiff DuBrook should have delivered but for Defendant's breach of contract and on which DuBrook would have realized the sum of $6.35 per cubic yard for profit and overhead; DuBrook is entitled to $7,277.10 damages.

3. DuBrook, having supplied concrete in accordance with the Purchase Order design mix, specifications and instructions of the project engineer and Gibson, is not responsible for any defects in the result.

4. Gibson and the project engineer having asserted such close control over the source, the formulation and the production of the concrete to be used in the Water Pollution Control Plant, responsibility for any delays in progress caused by a defect in the material cannot be assigned to DuBrook, Incorporated.

5. Gibson offered no competent proof of any delay in the project which could be attributed to any breach of contract, failure or omission on the part of DuBrook.

6. Defendant Gibson failed to prove its claim against DuBrook, Incorporated for damages by reason of any breach of contract, failure or omission of DuBrook in connection with the supplying of concrete to the Western Butler County Authority Water Pollution Control Plant project. Defendant Gibson's testimony in defense of Plaintiff's claim and in support of Defendant's Counterclaim, is not believable and is totally incredible.

7. A verdict is entered in favor of the Plaintiff and against the Defendant for the sum of $27,433.83, with interest at six (6%) per cent.

8. As to the counterclaim of the Defendant, the verdict is entered in favor of the Plaintiff.

VERDICT AND JUDGMENT

AND NOW, this 30th day of MARCH, 1981, as to the Plaintiff's claim, a verdict is rendered in favor of the Plaintiff and against the Defendant in the amount of $27,433.83, with interest at six (6%) per cent; as to the Defendant's Counterclaim, a verdict is rendered in favor of the Plaintiff and against the Defendant.

IT IS THE FURTHER ORDER OF THIS COURT, that judgment is now entered in favor of Plaintiff DuBrook, Inc. and against the Defendant, The W. B. Gibson Company, a corporation, in the amount of $27,433.83, with interest at six (6%) per cent, calculated from May 31, 1978. Costs shall be paid by the Defendant, The W. B. Gibson Company.

PAUL A. SIMMONS
United States District Judge

APPENDIX B

United States Court of Appeals
Affirmance of District Court's Opinion

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-1779

DuBROOK, INC., a corporation,

v.

THE W.B. GIBSON COMPANY, a corporation,
Appellant.

(Civil No. 79-1365—W.D.Pa.—Pittsburgh)

Submitted Under Third Circuit Rule 12(6)
November 12, 1981

BEFORE: SEITZ, *Chief Judge*, GARTH, *Circuit Judge*, and CAHN, *District Judge.**

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

---

* Edward N. Cahn, Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Appendix B. United States Court of Appeals Affirmance of District Court's Opinion.

Costs taxed against appellant.

By the Court,

SEITZ
Chief Judge

ATTEST:

SALLY MRVOS
Clerk

DATED: NOV 30 1981

Certified as a true copy and issued in lieu of a formal mandate on December 31, 1981.

Test: M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

APPENDIX C

Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-1779

DuBROOK, INC., a corporation,

v.

THE W. B. GIBSON COMPANY, a corporation,
Appellant.

(Civil No. 79-1365—W.D.Pa.—Pittsburgh)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALSIDERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges,* and CAHN, *District Judge.**

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the deci-

---

* Edward N. Cahn, Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

sion having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

SEITZ
Chief Judge

Dated: December 23, 1981

APPENDIX D

Granting Motion to Stay Issuance of Mandate

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-1779

DuBROOK, INC., a corporation,

vs.

THE W.B. GIBSON COMPANY, a corporation,
Appellant.

(D.C. Civil No. 79-1365)

Present: SEITZ, *Chief Judge;* GARTH, *Circuit Judge;* and CAHN, *District Judge.**

January 8, 1982

1—Motion by appellant To Stay Issuance Of Mandate Pending Application To The Supreme Court For Writ Of Certiorari, which the Court may wish to treat as a motion to recall and stay the mandate;

2—For your information, the certified judgment in lieu of formal mandate issued on December 31, 1981,

---

* Sitting by designation.

in the above-entitled case. Any answer which would be due by January 14, 1982, will be forwarded to you upon receipt of same.

Respectfully,

BETTY J. ROBINSON
Deputy Clerk

BJR:mmd
enc.

The foregoing Motion is granted—(illegible)

By the Court,

SEITZ
Chief Judge

Dated: January 21, 1982

APPENDIX E

Purchase Order of Gibson Co. to DuBrook, Inc.

EXHIBIT "A" [redacted] PURCHASE ORDER

THE W. B. GIBSON COMPANY № 24798

Box 420 / 200 Chestnut Northeast / Warren, Ohio 44483 / 216-394-8971

TO Du Brook Incorporated
P. O. Box 68
Butler, Pennsylvania 16001

DATE April 7, 1977

JOB SUPERINTENDENT

PHONE

ATTENTION Barney Ogorchock 412-283-3111

#24798

PLEASE FURNISH THE FOLLOWING AND SEND INVOICE IN DUPLICATE WITH BILL OF LADING TO THE PURCHASING DEPARTMENT ON DATE OF SHIPMENT.

Furnish and deliver Ready Mix Concrete in accordance with Sections III and IV of the specifications.

Work to comply with drawings 1 thru 67, specifications, and addenda 1 thru 5 all entitled "Western Butler Water Pollution Control Plant - Contract One-A General Construction Project No. C-420895-01," prepared by Duncan, Lagnese and Associates Inc.

1.	Class A concrete with Type II cement 4000 psi 6-1/2 sack minimum		$28.75/C. Y. Net
2.	Class B concrete with Type II cement 3000 psi 5-1/2 sack minimum		27.00/C. Y. Net
3.	Any concrete required with Type I cement will be ~~$1.00~~ .75/C. Y. less than price given above		
4.	Plastiment when ordered	ADD	.75/C. Y.
5.	Calcium when ordered	ADD	.60/C. Y.

(continued)

OUR JOB NO. Western Butler Water Pollution Control Plant
SHIP VIA
TO Market St., Zelienople, PA
TERMS Net 10 days after 1st or 15th of month or +.50/C. Y. after the 10 day period
F. O. B
DELIVERY As required

PLEASE SIGN PINK COPY AND RETURN

THE W. B. GIBSON COMPANY

B. E. Rhodes Purchasing Agent

Accepted By:

Appendix E. Purchase Order of Gibson Co. to DuBrook, Inc.

Du Brook Incorporated
Page 2
Purchase Order #24798

Clarifications:

a. Prices 1 and 2 are firm thru April 1, 1978. After April 1, 1978, items 1 and 2 will be increased $1.00/C. Y.

b. Prices 3, 4 and 5 are firm for duration of project.

c. Submit materials immediately to West Penn Laboratory for testing. Tests paid for by The W. B. Gibson Company.

d. There will be no minimum load charges, or delay time.

e. All heating is included in above prices.

f. W. B. Gibson Company to furnish access to and from site.

g. There will be no Saturday or Sunday delivery required.

This purchase order is contingent on The W. B. Gibson Company receiving a contract award from the owner. If for any reason we should not receive a contract award, this purchase order becomes void with no cancellation charges and no obligation on either parties' behalf. Do not begin fabrication or delivery until clause is removed by change order. Supplier agrees to proceed with all shop drawings immediately. Submit 9 copies of shop drawings for approval.

EXHIBIT "A" - concluded

THE W. B. GIBSON COMPANY

№ 24798

Box 430 / 300 Chestnut Northeast / Warren, Ohio 44483 / 216-394-2571

TO [illegible] DATE April 7, 1977
P. O. Box 69
Butler, Pennsylvania 16001 THE W. B. GIBSON CO.

JOB SUPERINTENDENT

PHONE

ATTENTION

PLEASE FURNISH THE FOLLOWING AND SEND INVOICE IN DUPLICATE WITH BILL OF LADING TO THE PURCHASING DEPARTMENT ON DATE OF SHIPMENT.

Furnish and deliver Ready Mix Concrete in accordance with Sections III and IV of the specifications.

Work to comply with drawings 1 thru 67, specifications, and addenda 1 thru 5 all entitled "Western Butler Water Pollution Control Plant - Contract One-A General Construction Project No. C-420805-01," prepared by Duncan, Lagnese and Associates Inc.

1. Class A concrete with Type II cement 4000 psi 6-1/2 sack minimum		$28.75/C. Y. Net
2. Class B concrete with Type II cement 3000 psi 5-1/2 sack minimum		27.00/C. Y. Net
3. Any concrete required with Type I cement will be ~~$1.00~~ .98/C. Y. less than price given above		
4. Plastiment when ordered	ADD	.75/C. Y.
5. Calcium when ordered	ADD	.60/C. Y.

(continued)

OUR JOB NO. Western Butler Water Pollution Control Plant
SHIP VIA
TO Market St., Zelienople, PA
TERMS Net 10 days after 1st or 15th of month
F. O. B or +.50/C. Y. after the 10 day period
DELIVERY As required

PLEASE SIGN PINK COPY AND RETURN
THE W. B. GIBSON COMPANY

Purchasing Agent

Accepted By [signature]

APPENDIX G

Concrete Mix Design Prepared by West Penn Testing Laboratory

West Penn Testing Laboratories, Inc.

An Independent Inspection Bureau and Testing Laboratory

482 West Eighth Avenue West Homestead, Pennsylvania 15120

P.O. Box 324 ☆ Area Code 412 461-3717

File No. 21027
May 4, 1977
Page 1

Report of

CONCRETE MIX DESIGNS

PROJECT:	Western Butler Water Pollution Control Plant
OWNER:	Western Butler County Authority
ENGINEER:	Duncan, Lagnese & Associates, Inc.
CONTRACTOR:	The W. B. Gibson Company
MATERIALS:	Cement - Bessemer - Type II
	Fine Agg. - Sand - Cooper Sand & Gravel
	Coarse Agg. - #2 Limeston. Sechan Limestone, Inc.
	Admixture - Sika AER - Sika Chemical Co.
SUPPLIER:	DuBrook, Inc.
DATE OF DESIGNS:	April 25, 1977

TRIAL MIX #1 - 4000# Psi at 28 Days - Air Entrained

	Weight Per Cubic Yard
Cement	611# (6.5 sack)
Sand	*1270#
Limestone - #2	*1800#
Water	292# (35 gals.)
Sika AER	1 oz./100# cement
Slump	3-1/2"
Air Content	6.3%

Compressive Strength Results: (Average of 3 Cylinders)

7 Days	28 Days (Due 5-23-77)
2920# Psi	5250# Psi

*Saturated Surface Dry

The W. B. Gibson Company
These documents have been reviewed and approved by the General Contractor with the following notations:

Date May 27, 1977

Signed

A28

APPENDIX H

Engineer's Notice to Contractor to Cease Pouring Except at Contractor's Risk

Duncan, Lagnese and Associates, Inc.
3182 Babcock Boulevard
PITTSBURGH, PENNSYLVANIA 15237

(412) 931-8400 (412) 364-5403

FILE

LETTER OF TRANSMITTAL

DATE SEPT 20, 1977 JOB NO

ATTENTION MR SWEET

RE CORE SAMPLING

WESTERN BUTLER

CONTRACT ONE-A

TO W. E. GIBSON CO.

GENTLEMEN:

APPENDIX H - Engineer's Notice to Contractor to cease pouring except at Contractor's risk.

WE ARE SENDING YOU ☐ Attached ☐ Under separate cover via _____ the following items:

☐ Shop drawings ☐ Prints ☐ Plans ☐ Samples ☐ Specifications

☐ Copy of letter ☐ Change order ☐ _____

COPIES	DATE	NO.	DESCRIPTION
TRANSCRIPTION OF "REMARKS" BELOW: -- 'Concrete core specimens will be required from areation Tank NO.2 Slab & Chlerine Contact Tank Slab as detailed on Page II-2 of the contract specifications. Specimens will be taken by W.P.T.L. at a time to be determined by the contractor. Any further construction on these two slabs will be at the contractor's risk."			

THESE ARE TRANSMITTED as checked below:

☐ For approval ☐ Approved as submitted ☐ Resubmit _____ copies for approval

☐ For your use ☐ Approved as noted ☐ Submit _____ copies for distribution

☐ As requested ☐ Returned for corrections ☐ Return _____ corrected prints

☐ For review and comment ☐ _____

☐ FOR BIDS DUE _____ 19_____ ☐ PRINTS RETURNED AFTER LOAN TO US

REMARKS CONCRETE CORE SPECIMENS WILL BE REQUIRED FROM AERATION TANK NO. 2 SLAB AND CHLORINE CONTACT TANK SLAB AS DETAILED ON PAGE II-2 OF THE CONTRACT SPECIFICATIONS. SPECIMENS WILL BE TAKEN BY W.P.T.L. AT A TIME TO BE DETERMINED BY THE CONTRACTOR. ANY FURTHER CONSTRUCTION ON THESE TWO SLABS WILL BE AT THE CONTRACTOR'S RISK.

COPY TO ENGINEER

SIGNED: [signature]

If enclosures are not as noted, kindly notify us at once.

Best Copy Available

APPENDIX I

Notice of DuBrook of Deficiency of Concrete

[illegible] VA. 22405

western union **Mailgram**

Dep Ex 16

2-137468E273002 09/30/77 ICS IPMBNGZ CSP CLVB
: MGM TDBN WARREN OH 09-30 0118P EST

W B GIBSON
PO BOX 430
WARREN OH 44482

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

TDBN WARREN OH 87 09-30 0118P EST
FON 4122833111
DUBROOK INC COPY MESSAGE
PO BOX 68
BUTLER PA 16001
REGARDS TO WESTERN BUTLER WASTEWATER TREATMENT PLAN ZELIENOPLE
PENNSYLVANIA
BE ADVISED OF THE FOLLOWING
1. 28 DAY CONCRETE CYLINDER TEST FOR CONCRET SLAB AT AERATION TANK NUMBER TWO AND CHLORINE TANK FAILED TO YIELD SPECIFIED STRENGTH OF 4,000 PSI
2. CORE CYLINDERS TAKEN ON 9 29 77 FAILED TO YIELD SPECIFIED STRENGTH OF 4,000 PSI

YOU ARE HEREBY NOTIFIED THAT IF WE ARE REQUIRED TO REPLACE ANY OF THIS CONCRETE THAT DUBROOK WILL BE HELD LIABLE FOR ALL COSTS INVOLVED IN THIS REPLACEMENT PLUS 15 PERCENT
B E RHODES CHIEF ENGINEER W B GIBSON CO WARREN OHIO

1311A EST

MGMCOMP MGM

APPENDIX J

Report of Erlin Hime Associates

ERLIN, HIME ASSOCIATES

MATERIALS AND CONCRETE CONSULTANTS

811 SKOKIE BOULEVARD
NORTHBROOK, ILLINOIS 60062

(312) 272-7720

3/8/78

PETROGRAPHIC STUDIES OF CONCRETE

FROM THE

WESTERN BUTLER WATER POLLUTION CONTROL PLANT

FOR

WEST PENN TESTING LABORATORIES, INC.

• • •

SUMMARY AND DISCUSSION

The cores were air-entrained and made with good quality and well-graded crushed limestone coarse aggregate and natural calcareous-siliceous sand fine aggregate. Cement contents are estimated to be at about the design level of 6-1/2 bags per cubic yard of concrete, and water-cement ratios were moderate to moderately high and comparable to what would be anticipated for the design water content. There was not present solid admixture components such as slag or flyash. The compositional characteristics of the residual cement were typical of Type II portland cement. Residual cement was abundant.

Air contents were from 7.4 to 9.5 percent, and at the higher air contents, the entrained air voids frequently were clustered in the mortar and in coarse aggregate sockets.

Among factors that will serve to cause reduced strengths are: (1) the somewhat high air contents; and (2) concrete placement during low temperatures so that cement hydration is slowed, and combinations of water-reducers (Plastiment) and low concrete temperatures. At low concrete temperatures, water-reducers act as retarders to cement hydration, and prolong strength development, particularly when Type II cements are used.

Defendant's Exhibit 20
Stipulated
Atty. for Plf.
Atty. for Def.

Best Copy Available

The significant amount of residual cement present in the cores will provide increased strength gain. The level of gain will be dependent upon the ability of the continued hydration to overcome the effects of the high air contents. There can be anticipated strength gains of at least about 500 to 700 psi providing the concrete is continuously moist cured, and curing temperatures are not low.

The overall quality of the concretes should provide for good durability with respect to resistance to cyclic freezing, chemical attack, and to wear.

* * *

INTRODUCTION

Reported herein are the results of petrographic studies of concrete cores submitted by N. D. Campbell of West Penn Testing Laboratories, Inc. The cores were reported to be from the Western Butler Water Pollution Control Plant where lower-than-designed compressive strength was encountered. Requested by Mr. Campbell were studies for evaluating the cores so that factors contributing to the low strength could be determined. In addition, interest was expressed in determining the potential for future strength gain.

Accordingly, the cores were examined using methods of petrographic microscopy, and the characteristics of their air-void systems were determined using the linear traverse technique and the procedures in ASTM C457, "Microscopical Determination of Air-Void Content and Parameters of the Air-Void System in Hardened Concrete."

STUDIES

Specimens - Received for the studies were six cores having diameters of 4 inches, and nominal lengths of 6 inches. The ends of the cores were sawed surfaces.

The cores were identified as Nos. 7, 8, 10, 12, 13, and 14. Cores 7, 8, and 10 were from the #2 Aeration Tank Base, and Cores 12, 13, and 14 were from the Chlorine Tank Base. The compressive strengths of the cores were from 2650 psi to 3690 psi.

The reported concrete mix was as follows:

Appendix J. Report of Erlin Hime Associates.

Type II Cement	611 pounds
Cooper Sand	1270 pounds
3/4-inch Sechan Limestone	1800 pounds
Water	292 pounds
Sika AER	6.1 ounces
Plastiment	19-1/2 ounces
Compressive Strength	4000 psi @ 28 da.

Each core was cut so that longitudinal cross sections were available for the air-void studies.

Petrographic Studies - Coarse aggregate of the cores was a crushed medium to dark grey, fine-grained, dense, generally equi-axial, and occasionally fossiliferous limestone or dolomite having a maximum nominal size of 3/4 inch. The fine aggregate was a natural calcareous-siliceous sand constituted of a variety of materials that included limestone, dolomite, quartz, feldspar, granite, chert, and mafic minerals.

The aggregates were well-graded and uniformly dispersed, and had been physically and chemically sound during their service in the concrete. The aggregates were of good quality.

Paste of the cores was medium brown-grey, dense, firm, and contained abundant residual cement and moderately-sized hydration products of the cement. The compositional characteristics of the residual cement are characteristic of Type II portland cement (as reported to have been used). The compositional and textural characteristics of the pastes are indicative of cement contents at about the design level of 6-1/2 bags per cubic yard of concrete, and a moderate to moderately high water-cement ratio.

The concretes were well-consolidated as evidenced by lack of honeycombing and particularly coarse voids. There was no evidence of segregation.

Air-Void Studies - A magnification of 75X was used.

Air contents of the cores were from 7.4 to 9.5 percent; specific surfaces were from 645 to 845 in^2/in^3; and void spacing factors were from 0.0034 to 0.0044 inch. A summary of the air-void data is given on the attached Table.

The air occurred as small, discrete, spherical voids characteristic of entrained air, and as coarser spherical and non-spherical voids characteristic of entrapped air. In the cores having the higher air contents, the entrained air-voids frequently occurred in small clusters in the mortar and in coarse aggregate sockets.

March 6, 1978

Erlin, Hime Associates, Inc.

By Bernard Erlin, President
Petrographer

Appendix J. Report of Erlin Hime Associates.

TABLE - Air-void data for the cores from the Western Butler Water Pollution Control Plant as submitted by West Penn Testing Laboratory

Core	Air (%)	Specific Surface (in^2/in^3)	Void Spacing Factor (in)*
7	7.8	845	0.0038
8	7.4	765	0.0044
10	8.8	810	0.0035
12	8.3	690	0.0044
13	9.5	645	0.0041
14	8.8	845	0.0034

* Calculated assuming a paste content of 25 percent

6.3

Supreme Court, U.S.
FILED
APR 1 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1634

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1981

DuBROOK, INC., a corporation,
Respondent

vs.

THE W.B. GIBSON COMPANY, a corporation,
Petitioner

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM C. ROBINSON
6 West Diamond Street
Butler, Pennsylvania 16001
(412) 282-2222
Attorney for Respondent

Counterstatement of Questions Presented

1. Where control over the concrete delivered to a job is assumed by the purchaser of the concrete, is the seller of the concrete barred from recovery of the sale price and damages if the concrete fails to meet specifications to which the purchaser is held by contract with a third party?

   Negatived in the courts below.

2. May a judge conclude that a counterclaim lacks credibility where the contractor never assigned inadequacies of concrete as a cause of job delay and never made a dollar demand for adjustment of accounts for deficiencies in the concrete until five days after suit was filed by the seller of the concrete?

   Affirmed in the courts below.

TABLE OF CONTENTS.

	Page
Counterstatement of Questions Presented...	1
Opinions Below.....	2
Counterstatement of the Case.....	3
Reasons for Denying the Writ.....	3
1. Based upon the facts of the case and elementary contract law, the decision below is clearly correct.....	3
2. The decision below does not conflict with the decision of other circuit courts.....	6
3. The case presents no constitutional question.....	8
Conclusion.....	10

INDEX TO CITATIONS.

Cases:

	Page
Commonwealth Dept. of Transportation v. W. P. Dickerson & Son, Inc., 42 Pa. Commw. Ct. 359, 400 A.2d 930 (1979).....	5
C. J. Langenfelder & Son v. Commonwealth Dept. of Transportation, 44 Pa. Commw. Ct. 585, 404 A.2d 745 (1979).....	5

Miscellaneous:

Restatement, Second, Contracts § 202(4) (1981).....	5
Supreme Court Rule 17.1.....	6, 7
Supreme Court Rule 17.1(a).....	6

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1981

No. 81-1634

DuBROOK, INC., a corporation,
Respondent

vs.

THE W. B. GIBSON COMPANY, a corporation,
Petitioner

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

DuBrook, Inc., a Pennsylvania corporation, the Respondent herein, offers the following as and for its Brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, whose Judgment Order was entered in the above captioned case on November 30, 1981:

Opinions Below

The Opinion of the United States District Court for the Western District of Pennsylvania and its affirmance by the United States Court of Appeals for the Third Circuit are adequately set forth in Appendix A of the Petitioner's Brief. It should also be noted that the affirmance by the Third Circuit was without Argument.

Counterstatement of the Case

Respondent adopts as its Counterstatement of the Case the Preliminary Statement and Findings of Fact of the United States District Court for the Western District of Pennsylvania, as contained in Appendix A of the Petitioner's Brief at pages A1 through A15.

Reasons for Denying the Writ

1. BASED UPON THE FACTS OF THE CASE AND ELEMENTARY CONTRACT LAW, THE DECISION BELOW IS CLEARLY CORRECT.

A careful review of the facts in this case indicates that the case involves really no more than any other typical, day-to-day, failure to pay controversy. Notwithstanding the Petitioner's insistance to the contrary, the terms of the

contract and their related technical niceties have little to do with what happened and with how the case has been decided. The District Court had available to it a detailed record of the trial and the benefit of an Argument at length in which the Petitioner attempted to deny responsibility and culpability for the problems which were encountered in the performance of the contract. Nevertheless, the record presented such a clear and uncontroverted line of developments during the performance of the contract, that the court found no difficulty in finding for the Respondent. And, apparently, the Third Circuit panel that reviewed the record also felt so moved, so much so that it cancelled the Argument on the Petitioner's appeal to that court.

The law in this case is simple and has been correctly applied:

> Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

Restatement, Second, Contracts § 202(4)(1981). Here, the Petitioner's responsibility, involvement, and participation in changes in the concrete mix were sufficient to convince both courts below that the Respondent had fulfilled its obligations under the contract. Pennsylvania case law clearly confirms this position. Commonwealth Dept. of Transportation v. W. P. Dickerson & Son, Inc., 42 Pa. Commw. Ct. 359, 400 A.2d 930 (1979). C. J. Langenfelder & Son v. Commonwealth Dept. of Transportation, 44 Pa.

Commw. Ct. 585, 404 A.2d 745 (1979).

2. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF OTHER CIRCUIT COURTS.

Petitioner cites two Ninth Circuit cases, one case from the United States District Court for the Eastern District of Pennsylvania, and one case from the Texas Court of Appeals. Petitioner asserts that the holdings of these cases and the decision in the instant case create a conflict among the Circuit courts so as to provide a reason for this Court to consider the within Petition pursuant to Supreme Court Rule 17.1(a). Such a contention is so incredible that no answer might be the appropriate reply, given the fact that Rule 17.1 indicates that a Petition for Writ of

Certiorari "will be granted only when there are special and important reasons therefor." However, a few words of rebuttal will be offered.

First, their can be no doubt that the Circuit courts do not conflict in their decisions relating to how contracts ought to be interpreted. These courts all agree that the test of interpretation is one that views a contract as a whole, including any actions which the parties may have taken in the performance of its terms.

Second, the cases cited by the Petitioner are all clearly distinguishable from the present case. Careful reading of these cases indicates that the distinguishing factor is, again, crucial facts which impact upon the interpretation of the respective contracts under basic contract

law. In the interest of brevity, it may be said with accuracy that each case cited by the Petitioner contains a fatal flaw (i.e. incorporation by reference, agreement to replace defective concrete, batching mistake by supplier, collateral agreement by supplier, etc.) which results in an appropriate holding. None of these factual flaws are present in the instant case. Petitioner's attempts to convince any court to view this case as a concrete case rather than a contract case are without merit.

3. THE CASE PRESENTS NO CONSTITUTIONAL QUESTION.

The Petition for Writ of Certiorari alludes to deprivation of Petitioner's

"constitutionally protected property and contract rights." Petition at i. However, Petitioner does not explain how or in what manner it may have been deprived of those rights without due process. In fact, Petitioner makes no due process claim at all, but rather, (apparently by osmosis), contends that somehow there has been deprivation of property. It may be true that, should the decisions below be allowed to stand, Petitioner will be deprived of property. However, it is clear from the record that this deprivation of property was not without due process of law. Petitioner had the benefit of a full trial, Argument on the merits, decision on the complete record in accordance with Petitioner's agreement, and the exercise of its right of appeal to the Circuit court. There are no procedural defects, and the Petitioner has no due process claim.

Conclusion

Based upon the reasons set forth above, Respondent respectfully requests that this Court deny the within Petition for Writ of Certiorari.

Respectfully submitted,

William C. Robinson

WILLIAM C. ROBINSON
Attorney for Respondent